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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 ANTHONY EUGENE HEROD, )  
09 Plaintiff, ) CASE NO. C10-1725-RSM  
10 v. )  
11 KING COUNTY ) REPORT AND RECOMMENDATION  
12 Defendant. )  
13 \_\_\_\_\_ )

14 INTRODUCTION AND SUMMARY CONCLUSION

15 Plaintiff Anthony Eugene Herod is a state prisoner who brings this civil rights action  
16 under 42 U.S.C. § 1983 to allege that his constitutional right to access the courts was denied  
17 during the course of his incarceration at the King County Correctional Facility (“KCCF”) in  
18 2010. Plaintiff identifies King County as the lone defendant in this action. Defendant King  
19 County now moves for summary judgment. Plaintiff has been advised of the summary  
20 judgment requirements pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), but has  
21 filed no response to defendant’s motion. The Court, having reviewed defendant’s motion, and  
22 the balance of the record, concludes that defendant’s motion for summary judgment should be

01 granted and that plaintiff's amended complaint, and this action, should be dismissed with  
02 prejudice.

### 03 BACKGROUND

04 Plaintiff was booked into the King County Correctional Facility ("KCCF") on April 25,  
05 2009 and he remained there until September 3, 2010 when he was transferred to the  
06 Washington Department of Corrections. (Dkt. No. 21 at 5.) During the course of his  
07 incarceration at KCCF, plaintiff was assigned to various housing units within the facility  
08 including administrative segregation, general population, disciplinary deadlock, and  
09 psychiatric housing. (*See id.* at 5-11.) Plaintiff was assigned for significant periods of time to  
10 an acute isolation cell in the psychiatric unit. (*See id.* at 7-10.) Acute isolation cells are used  
11 to house inmates who are deemed suicidal by the Jail Health Services psychiatric staff. (*Id.* at  
12 7.) Acute isolation cells are also used to house non-suicidal psychiatric inmates who are  
13 extremely dangerous and assaultive to other inmates and/or staff. (*Id.*)

14 While confined in psychiatric housing on the seventh floor of KCCF, plaintiff requested  
15 on numerous occasions, through the KCCF kite system, that he be granted access to legal  
16 information. (Dkt. No. 10 at 3.) According to plaintiff, he never received any response to  
17 those requests. (*Id.*) On February 19, 2010, plaintiff filed a grievance asking why he was not  
18 allowed to use the legal workstation, a computer available for inmate use which provides online  
19 access to a Westlaw database. (*Id.* at 7-8.) Plaintiff was advised that he was not eligible to  
20 use the legal workstation because of his housing location. (*Id.* at 8.)

21 Shortly after plaintiff received the response to his initial grievance concerning use of the  
22 legal workstation, plaintiff was granted leave to represent himself in his ongoing King County

01 Superior Court criminal proceedings. (*See* Dkt. No. 10 at 8 and 10.) On March 1, 2010,  
02 plaintiff was advised by Corrections Program Supervisor Vicki Shumaker that under the  
03 Revised Legal Workstation Policy, he had become eligible to be scheduled to use the legal  
04 workstation. (*Id.* at 9.) Plaintiff was advised at the same time that officers could deny an  
05 inmate access to the legal workstation if they had “reason to believe the inmate is presenting a  
06 risk to safety or security.” (*Id.*)

07 From March 3, 2010 to May 18, 2010, plaintiff was scheduled to use the legal  
08 workstation for two hours each day. (Dkt. No. 21 at 10.) However, plaintiff was not  
09 permitted to use the legal workstation for much of that period because he remained in  
10 psychiatric isolation and was deemed a safety risk. (*Id.*) Despite his minimal access to the  
11 legal workstation, plaintiff managed to file multiple motions in his criminal case which were  
12 heard by the court. (*See* Dkt. No. 20, Exs. 2-10, 13 and 14.) Plaintiff also had the benefit of  
13 standby counsel during this period of time. (*See id.*, Ex. 1.) On May 18, 2010, counsel was  
14 again appointed to represent plaintiff in his criminal proceedings and his pro se status was  
15 terminated. (*Id.*, Exs. 13 and 14.) Plaintiff’s appointed counsel filed various pretrial motions,  
16 submitted required trial documents, and represented plaintiff at his criminal trial. (*Id.* at 3.)

17 Plaintiff submitted this action to the Court for filing in October 2010. (*See* Dkt. No. 1.)  
18 The operative complaint in this action is the amended complaint filed by plaintiff in December  
19 2010. (Dkt. No. 10.) Plaintiff alleges in his amended complaint that his federal constitutional  
20 rights were violated when he was denied access to the legal workstation at KCCF because of his  
21 housing assignment. (*Id.* at 3-5.)

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01 DISCUSSION

02 Summary Judgment Standard

03 Summary judgment is proper only where "the pleadings, depositions, answers to  
04 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
05 genuine issue as to any material fact and that the moving party is entitled to judgment as a  
06 matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the  
07 absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
08 242, 257 (1986). Genuine disputes are those for which the evidence is such that a "reasonable  
09 jury could return a verdict for the nonmoving party." *Id.* Material facts are those which might  
10 affect the outcome of the suit under governing law. *Id.*

11 In response to a properly supported summary judgment motion, the nonmoving party  
12 may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts  
13 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
14 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of  
15 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling  
16 on a motion for summary judgment, the court is required to draw all inferences in a light most  
17 favorable to the nonmoving party. *Id.* at 248. The court may not weigh the evidence or make  
18 credibility determinations. *Id.*

19 Section 1983 Standard

20 In order to sustain a cause of action under 42 U.S.C. §1983, a plaintiff must show (i) that  
21 he suffered a violation of rights protected by the Constitution or created by federal statute, and  
22 (ii) that the violation was proximately caused by a person acting under color of state law. *See*

01 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The causation requirement of § 1983  
02 is satisfied only if a plaintiff demonstrates that a defendant did an affirmative act, participated in  
03 another's affirmative act, or omitted to perform an act which he was legally required to do that  
04 caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981)  
05 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

06 A local government unit or municipality can be sued as a “person” under § 1983.  
07 *Monell v. Department of Social Servs., of City of New York*, 436 U.S. 658, 691 (1978).  
08 However, a municipality cannot be held liable under § 1983 solely because it employs a  
09 tortfeasor. *Id.* A plaintiff seeking to impose liability on a municipality under § 1983 must  
10 identify a municipal “policy” or “custom” that caused his or her injury. *Bryan County*  
11 *Commissioners v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell* 436 U.S. at 694).

#### 12 Access to Courts

13 Plaintiff asserts in his amended complaint that he was denied his constitutional right to  
14 access the courts at KCCF in early 2010. More specifically, plaintiff complains that he was  
15 impermissibly denied access to the facility’s legal workstation based solely on the fact that he  
16 was assigned to psychiatric housing.

17 In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court acknowledged that inmates  
18 have a constitutional right of meaningful access to the courts premised on the due process  
19 clause. *Id.* at 821. The Supreme Court subsequently made clear that in order to adequately  
20 allege a cause of action for deprivation of the right of access to the courts, an inmate must  
21 demonstrate that he suffered some actual injury to his right of access. *Lewis v. Casey*, 518 U.S.  
22 343 (1996).

01       The Supreme Court explained in *Lewis* that *Bounds* did not create an abstract,  
02 free-standing right to a law library or to legal assistance, and that an inmate therefore could not  
03 establish relevant actual injury “simply by establishing that his prison's law library or legal  
04 assistance program [was] sub-par in some theoretical sense.” *Lewis*, 518 U.S. at 351. Rather,  
05 in order to establish a *Bounds* violation, an inmate was required to demonstrate that the alleged  
06 shortcomings in the prison’s legal access scheme had hindered, or were hindering, his ability to  
07 pursue a non-frivolous legal claim. *See id.* at 354-55.

08       It appears from the record that the exclusive avenue for obtaining access to legal  
09 materials at KCCF is the legal workstation. (*See* Dkt. No. 21, Exs. 1 and 4.) According to  
10 defendant, the legal workstation is located in a room which does not allow corrections officers  
11 to directly observe at all times inmates using the workstation. (*See id.* at 3.) Because inmates  
12 in psychiatric housing are deemed to be particularly unpredictable and dangerous, they are  
13 generally not allowed to use the legal workstation. (*See id.* at 3-4.) Defendant notes that the  
14 room contains heavy equipment, as well as electrical cords, all of which pose a particular risk to  
15 inmates with mental health diagnoses, especially those that have indicated a desire to harm  
16 themselves. (*Id.* at 4.)

17       Defendants effectively concede plaintiff’s assertion that he was denied access to the  
18 legal work station in early 2010 because of his assignment to psychiatric housing. It is  
19 somewhat troubling that the legal access scheme at KCCF is not designed to accommodate this  
20 segment of the KCCF population. However, as noted above, it is not enough to simply identify  
21 deficiencies in the legal access program. In order to establish a *Bounds* violation, an inmate  
22 must demonstrate that he suffered some actual injury as a result of the deficiencies in the legal

01 access program. The record reflects that during the time plaintiff was confined in psychiatric  
02 housing, he filed multiple motions in his criminal case which were heard by the court. In  
03 addition, plaintiff had the benefit of standby counsel even after being granted leave of court to  
04 proceed *pro se* in his criminal proceedings.

05 On May 18, 2010, plaintiff's *pro se* status was terminated after counsel was again  
06 appointed to represent plaintiff. Plaintiff's appointed counsel filed various pretrial motions,  
07 submitted required trial documents, and represented plaintiff at his criminal trial. Plaintiff was  
08 cleared for general population on May 26, 2010, and was assigned to a close security unit where  
09 he had access to the legal workstation. Plaintiff did not actually go to trial in King County  
10 Superior Court until July 2010. *See State of Washington v. Anthony Eugene Herod*, King  
11 County Superior Court Case Number 09-1-03972-7.

12 While plaintiff asserts in his amended complaint that his lack of access to the legal  
13 workstation caused him to give up his *pro se* status and precluded him from assisting his  
14 appointed attorney, he offers no evidence to support this assertion. As plaintiff has not  
15 demonstrated that he suffered any actual injury as a result of his lack of access to the legal  
16 workstation in early 2010, he has not established a *Bounds* violation. Accordingly, defendants  
17 are entitled to summary judgment in this action.

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01 CONCLUSION

02 Based on the foregoing, this Court recommends that defendant's motion for summary  
03 judgment be granted and that plaintiff's amended complaint, and this action, be dismissed with  
04 prejudice. A proposed order accompanies this Report and Recommendation.

05 DATED this 18th day of July, 2011.

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08 Mary Alice Theiler  
09 United States Magistrate Judge  
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